

STATE OF MICHIGAN
COURT OF APPEALS

LMT CORPORATION,

Plaintiff/Counter-Defendant-
Appellee,

v

COLONEL, L.L.C., JAMES T. KARDOOSH, and
DANIEL B. MCBRIDE,

Defendants,

and

TRIANGLE PLUS ASSOCIATES, L.L.C.,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

April 19, 2011

No. 294063

Macomb Circuit Court

LC No. 2007-002110-CK

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant/counter-plaintiff, Triangle Plus Associates, L.L.C. (Triangle), appeals as of right a judgment in its favor. We reverse and remand to the trial court for the calculation of Triangle's monetary damages.

Triangle filed a counterclaim against plaintiff/counter-defendant, LMT Corporation (LMT), after LMT wrongfully removed equipment from Bayview Barge Bar & Restaurant (Bayview), the premises that LMT was leasing from Triangle.¹ Triangle first argues that the trial court erred in concluding the trial testimony was too speculative to award money damages. We agree. On appeal following a bench trial, a trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. MCR 2.613(C); *Lamp v Reynolds*, 249 Mich

¹ The parties also disputed the ownership of the liquor license. That issue was resolved and is not at issue in this appeal.

App 591, 595; 645 NW2d 311 (2002). A trial court's damage award in a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.* (citation omitted). A damage award is not clearly erroneous where the damage award was within the range of the evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513, 516; 667 NW2d 379 (2003). If damages are speculative or based on conjecture, they are not recoverable. *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010). However, it is not necessary for damages to be determined with mathematical certainty. Rather, it is sufficient if there is a reasonable basis for computation. *Id.* "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004), quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995) (emphasis added). Remand is warranted where the trial court's dispositional holding is insufficient for this Court to determine whether the trial court reached the proper result on the basis of its findings of fact. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000).

In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement. *Davidson v General Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982) mod on reh 136 Mich App 203; 357 NW2d 59 (1984). "The proper measure of damages for breach of contract is, therefore, the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Id.* The intent of an award for damages in a breach of contract action is to place the plaintiff or counterplaintiff in as good a position as he would have occupied if the terms of the contract had been fulfilled. *Goodwin, Inc v Orson E Coe Pontiac, Inc (Supp)*, 62 Mich App 405, 412; 233 NW2d 598 (1975). The value of performance and damages should be equal. *Id.* at 412-413. However, the injured party should not obtain a windfall; that is, he should not be placed in a better position as a result of the breach. *Id.* at 413. Thus, any mitigation or savings to the injured party should be deducted from any award. *Id.*

The trial court held that Triangle established the fact that money damages occurred in this case. Therefore, the damages need not be determined with mathematical certainty; it is sufficient that a reasonable basis for computation is presented. *Chelsea Investment Group*, 288 Mich App at 255. Donald Scheible was qualified as an expert in the fields of architecture and management of construction projects. Scheible calculated that it would cost \$450,000 to completely rebuild Bayview and over \$300,000 to refurbish Bayview. Scheible's calculations were computed using several information sources. Scheible visited Bayview and observed the damage LMT caused to the building in removing the equipment. He used nationally accepted calculation formulas in calculating repair costs, but made an adjustment for the Detroit area. Scheible testified that while he was not aware of the specific building codes in Harrison Township and he had not worked on a restaurant building in Harrison Township, he did not need to know the specific building codes of Harrison Township to accurately access the cost of doing the repair work. Scheible stated that because the standard throughout the various municipalities remained the same, minor variances within the specific provisions of each municipality's building codes would not change the cost of doing the repair work. Scheible did not calculate the cost of re-

installing the equipment LMT wrongfully removed, rather, his calculations presumed the use of new equipment. Additionally, Thomas LeFevre admitted that improvements valued at \$150,000 were made to the property during the lease period. While LeFevre testified that someone with his expertise in the restaurant industry could put a similar restaurant together with the disputed equipment for less than \$100,000, he admitted it would cost someone without his expertise more money.

We conclude that both Scheible and LeFevre provided a reasonable basis for the computation of the money damages amount. Scheible used nationally accepted calculation formulas and made adjustments for the local region of Detroit. Furthermore, he specifically testified that because he was familiar with the building code standards, which do not change between the various municipalities, he did not need to know Harrison Township's specific building codes in calculating damages. LeFevre testified that he owned five restaurants within Macomb County within the past five years, and that he regularly did consulting work for opening various restaurants in Michigan and nationwide.

Both parties acknowledged that fixtures were removed. LeFevre testified that he thought he was entitled to remove the property because Charles Babcock planned to demolish the building. Babcock testified that the best use of the property in the economic climate was to continue to lease the premises. Babcock testified that the manner of the improper removal caused further property damage. Indeed, Scheible testified that he thought that the property had been vandalized. In light of the trial court's holding that Triangle suffered money damages, the only question that remained was the amount of money damages to be awarded, and we remand for that determination.

Triangle also argues that this Court should award treble damages for LMT's conversion of the equipment wrongfully taken from Bayview. We disagree. Statutory interpretation is a question of law that is reviewed de novo on appeal. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

MCL 600.2919a(1) provides, "[a] person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees: (a) Another person's stealing or embezzling property or converting property to the other person's own use." Michigan courts have generally held that the term "may" is permissive whereas the term "shall" is mandatory. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Thus, pursuant to the language in MCL 600.2919a(1), treble damages are permissive. Therefore, the trier of fact has the discretion to decide whether to award treble damages pursuant to MCL 600.2919a when actual damages are sustained as a result of another person stealing, embezzling, or converting one's property. Because the determination of treble damages is for the trier of fact, on remand, the trial court must determine if treble damages are appropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood